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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1940**

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**No. 755**

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**J. ROB GRIFFIN, ADMINISTRATOR, WITH WILL ANNEXED OF  
THE ESTATE OF ROBERT D. GORDON, DECEASED,**

*Petitioner,*

*vs.*

**JOHN D. McCOACH, TRUSTEE.**

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.**

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**JOS. W. BAILEY, JR.,  
C. J. SHAEFFER,**  
*Counsel for Petitioner.*

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**SUPREME COURT OF THE UNITED STATES**

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.**

---

*To the Honorables the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

Your petitioner respectfully submits his petition for a writ of certiorari, directed to the record of the proceedings in the Circuit Court of Appeals for the Fifth Circuit, to bring such record here for revision and review of the decision of that Court in the above entitled cause.

**Summary Statement of the Matter Involved.**

This action was brought in the United States District Court for the Northern District of Texas by the Estate of Robert D. Gordon, deceased, against the Prudential Insur-

ance Company of America, seeking to recover upon a policy of life insurance issued on the life of Robert D. Gordon (R. 1).

The insurance company answered filing a cross claim, in true form a bill of interpleader, and interpleaded John D. McCoach, Trustee, and sundry other parties, alleging that McCoach, Trustee, claimed as trustee for the owners of the policy by an assignment, and also was named as beneficiary therein. Having tendered the amount due under the policy into the Registry of the Court, it was discharged with its fees and costs, and the controversy over these funds was decided in favor of McCoach, the Trustee (R. 2).

The interpleader proceeding was brought pursuant to the Act of Congress authorizing insurance interpleaders. McCoach, Trustee, and the other cross-defendants were citizens of the State of New York. The plaintiff and the decedent were citizens of the State of Texas. The appeal to the Circuit Court was on an agreed statement under the provisions of Rule 76.

Gordon had originally had dealings with the Middletown Tex Oil Syndicate, which was composed of McCoach and the other cross-defendants (R. 3). That enterprise failed, and its only asset was a \$50,000.00 policy upon the life of Gordon (R. 2-3). An association called "the Protection Syndicate" was then formed (R. 3) by the cross-defendants for the sole purpose of paying the premiums on the policy and receiving the money at the death of Gordon. McCoach was Trustee of that syndicate. The beneficiary was changed by Gordon to designate the Protective Syndicate and its individual members as beneficiaries, in place of the Middletown Tex Oil Syndicate.

The original policy was simply a term policy, with the privilege for conversion into an ordinary life policy at the expiration of seven years. At that time Gordon converted the term policy into a new policy, the beneficiaries desig-

nated being the individual members of the Protection Syndicate (R. 4). Each policy had provided by express terms that the insured, Gordon, reserved the right to change the beneficiary by a written application with surrender for endorsement. The converted policy provided for disability payments payable to Gordon. The policy remained in the possession of the Syndicate at all times, and it paid the premiums thereon, except one quarterly premium of \$260.00 paid by Gordon.

Gordon was indebted to the members of the Syndicate for loans and advances. There was no claim that the policy had ever been pledged to secure these loans and advancements. On the contrary, the Syndicate recognized Gordon's right to change the beneficiary in the course of some negotiations, in the year 1934 and made him a proposal, by United States mail sent from the State of New York to his home in Tyler, Texas (he having been throughout the entire period a citizen of the State of Texas), whereby the Syndicate offered to give Gordon a one-eighth interest in the policy, which had a disability benefit clause, in the case of total disability during his lifetime, and a one-eighth interest in the same to be paid at his death to his wife and to continue to pay the premiums, in consideration of his changing the beneficiary to McCoach, Trustee, and placing the policy under McCoach's exclusive control (R. 5).

This offer was accepted by Gordon by letter deposited in the United States mail in Tyler, Texas, and received by the Syndicate in the State of New York. The Syndicate then communicated with the Prudential Insurance Company at its Home Office in the State of New Jersey, the terms of the agreement with Gordon, and asked for the furnishing of appropriate forms. These forms were furnished by the insurer to the Syndicate, accompanied by a letter stating that upon receipt of the same properly executed, with the policy, the policy would be so endorsed. These forms were

then sent to Gordon in Texas from New York, were executed before a Notary Public in Texas by him and returned by mail to New York, where they were executed by the Syndicate, and then, accompanied by the policy, were sent to New Jersey, where the endorsement was made on the policy and it was returned to McCoach, Trustee (R. 6).

After this arrangement had been consummated, three of the original members of the Syndicate assigned their interest in the policy to persons who were total strangers to Colonel Gordon, who had advanced no money to him, were not related to him, and had no connection with him, except that they paid their pro rata share of the premiums thereafter maturing, until he became disabled in the year 1936 (R. 7 & 8). McCoach, Trustee, in this proceeding, claimed as trustee for the three assignees, and not for the original members of the Syndicate who had assigned to them (R. 9).

The case was submitted in the Fifth Circuit Court of Appeals on the 7th day of November, 1940, and decided on the 9th day of December, 1940, and the judgment of the lower court in favor of McCoach, Trustee affirmed. Motion for rehearing was filed on the 30th day of December, 1940, which motion was thereafter overruled by the Circuit Court of Appeals without written opinion, on the 14th day of January, 1941, and the mandate staid pending application to this court for Writ of Certiorari.

#### Questions Presented.

1. The first question is, in a proceeding such as this, in view of the decision of this Honorable Court in *Erie v. Tompkins*, 304 U. S. 64, and related cases, denying the existence of any general law of the United States, what law must guide the lower court in a bill of interpleader?

2. The next question is whether or not the law and public policy of Texas should not be applied by the United States

Court in an interpleader case such as this? Under Texas law, both as to its substantive law and the local rule of conflicts of law, the decree should have been in favor of Griffin, Administrator, because the law of Texas clothed McCoach as Trustee with a trust in favor of the insured's estate insofar as he claimed as trustee for *cestuis que trustent* who had no insurable interest; and he repudiated the only trust recognized under Texas law.

3. The second question above propounded concedes the truth of the legal proposition laid down by the Circuit Court of Appeals, that the law of New York governed the agreement of the parties. The record (R. 5 & 6), however, shows that the agreement whereunder McCoach, Trustee, was assigned the policy and named beneficiary was made in Texas, and for that reason he is governed by Texas law in his capacity as such. This is based upon the fact that the two contract rights which Gordon had in the policy at the time of the last agreement with the Syndicate were, first, the right to change the beneficiary, and second, the right to receive the disability payments during his life. This power to appoint and contractual right had a situs in his domicile, and the contract whereby he conferred them on McCoach was consummated by his posting a letter of acceptance in the United States mail in Texas.

#### **Reasons Relied On for Allowance of the Writ.**

(a) The Circuit Court of Appeals has decided a question of general importance, which is a question of substance involving the construction of a statute of the United States, which should be settled by this Court, and that is: Where a proceeding is instituted by an insurance company under provisions of 28 U. S. C. A., Sec. 41 (26), the Act of Congress of January 20, 1936, c. 13, Sec. 1, 49 Stat. 1096, what law should be applied by the court in which the interpleader is filed, in determining the controversy?

This involves inquiry as to whether or not the case of *Sanders v. Armour Fertilizer Works*, 292 U. S. 190, holding that, in such an instance the United States court would apply general law, has not been overruled by the decision in *Erie Ry. Co. v. Tompkins*, 304 U. S. 64, which is applicable to bills in chancery; *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202; *Cities Service Oil Co. v. Dunlop*, 308 U. S. 208; *Fidelity Union Trust Co. v. Field*, 311 U. S. —, 61 Sup. Ct. 176; *West, et al. v. American Telephone Co.*, 311 U. S. —, 61 Sup. Ct. 179.

(b) The decision of the Circuit Court of Appeals is in conflict with the decision of the Seventh Circuit in the case of *Toomey v. Toomey*, 98 F. (2d) 736, holding that in a bill of interpleader the United States court is bound to apply the law of the State wherein it sits.

(c) The decision of the Circuit Court of Appeals does not give proper effect to the applicable decisions of this Court cited in (a) above, in that it cites and relies upon cases decided by this Court prior to the decisions above mentioned, which were either decisions interpreting the law of States other than the State of Texas, or decisions by this Court announcing the general law in accordance with the decision of *Swift v. Tyson*, 16 Pet. 1. These decisions, *Grigsby v. Russell*, 222 U. S. 149; *Phoenix Mutual Life Ins. Co. v. Bailey*, 13 Wall. 616; *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591; *Connecticut Mutual Life Ins. Co. v. Schafer*, 94 U. S. 457; *Northwestern Life Ins. Co. v. Johnson*, 254 U. S. 296, announce rules in conflict with the law of Texas, which is reviewed by the Fifth Circuit in its decision in *Peoples Life v. Whiteside*, 94 F. (2d) 409, and exemplified by such decisions as *Cheevès v. Anders*, 87 Tex. 287, 28 S. W. 274, and *Wilke v. Finn*, 39 S. W. (2d) 836.

(d) The decision of the Circuit Court of Appeals is in conflict with the decision of the 9th Circuit in the case of

*Sampson v. Channell*, 110 F. (2d) 754; certiorari denied 310 U. S. 650, which holds that in a transitory cause of action the United States court must apply the rules of conflict of law as laid down and interpreted by the Supreme Court of the State wherein it sits; and under the Texas rule of conflicts of law, the assignments to the parties having no insurable interest would not have been recognized, because contrary to the public policy of the State.

(e) The Circuit Court of Appeals has failed to give proper effect to the decision of this Court in *Bond v. Hume*, 243 U. S. 15, which holds that a State of the Union may decline the enforcement of a contract made in another State, which violates the public policy of the State where enforcement is sought.

(f) The Circuit Court of Appeals has failed to give proper effect to the decision of this Court in *Union Trust v. Grossman*, 245 U. S. 413, in that that decision holds that the public policy of Texas inhibits enforcement of a contract made by a married woman, a citizen of Texas, in another State, contrary to the public policy of Texas, in the United States court sitting in Texas. And in the controversy here the insured was at all times a citizen of Texas.

(g) The Circuit Court of Appeals has so far departed from the accepted and usual judicial course of procedure as to call for the exercise of this Court's power of supervision, in that it has held contrary to the unanimous weight of authority that the assignment of a life insurance policy is governed by the law of the policy, even though it is a separate and independent contract made in the State of Texas, whereas the policy was governed by the State of New York.

(h) In like manner, the Circuit Court of Appeals has erroneously held that the power to appoint which is re-

served to the insured is governed by the law governing the policy, where the insured is domiciled in another State, and the only act performed by the insurer in connection with the right to change the beneficiary is the ministerial act of endorsement.

### Conclusion.

The decision of the Circuit Court of Appeals erroneously construes the legal effect of the stipulated facts, both in determining the contractual rights of the parties and their sitii, and likewise, after so doing, applies rules drawn from decisions which have no application and which are, as applied by the Circuit Court of Appeals, in the very teeth of the decisions of this Court announcing that there is no general law of the United States.

WHEREFORE, PREMISES CONSIDERED, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the Honorable Circuit Court of Appeals for the Fifth Circuit, in the above cause, and that the record be removed to this Court, and that the decree of the lower court be reversed.

Respectfully submitted,

JOS. W. BAILEY, JR.,  
C. J. SHAEFFER,  
*Attorneys for Petitioner.*

BAILEY & SHAEFFER,  
*Dallas, Texas,*  
*Of Counsel.*

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1940**

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---

**BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.**

---

*To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

**Opinions of Courts Below.**

There was no opinion filed in the District Court.

The opinion of the Circuit Court of Appeals (R. 31) is reported 116 F. (2d) 262. The motion for rehearing was overruled without opinion (R. 45). The decree of the Circuit Court of Appeals was rendered on December 9, 1940; petition for rehearing was filed December 30, 1940 (R. 37), and overruled January 14, 1941 (R. 45).

The jurisdiction of this Court is invoked and believed to be sustained under Sec. 240-a, Judicial Code (Sec. 347-a, Title 28, U. S. C. A.), as amended by Act of Congress of February 13, 1925.

**Statement of Facts.**

The facts have already been stated in a general fashion in the petition. Where the attention of the Court is directed to a specific fact, record reference will be made, or quotation taken from the record incorporated in the brief. The opinion of the Circuit Court is inaccurate in some of its statement of facts, and these inaccuracies will be noted through the brief.

**Specifications of Error.**

(Presented in the Motion for Rehearing R. 37-44.)

**I.**

The Circuit Court of Appeals erred in holding that the United States Court sitting in Texas could apply the laws of the State of New York in its decision contrary to the public policy of Texas, and thus permit the United States Court sitting in Texas to reach a conclusion directly at variance on the identical state of facts which would have been reached by the Texas court of concurrent jurisdiction.

**II.**

The Circuit Court of Appeals erred in applying the rules of law announced by the Supreme Court of the United States under its assumed power as expositor of general law to determine the rights of the parties in this case contrary to the Constitution of the United States as now interpreted by the Supreme Court.

**III.**

The Circuit Court of Appeals erred in holding that the law of Texas was identical with that announced by the decisions of the United States Supreme Court in the decisions cited, to the effect that where an insurable interest

is present when the policy is issued it is valid, and even if assigned is not within the rule against wagers, because the law of Texas as announced by the Supreme Court is to the effect that an insurance policy cannot be assigned or held by any person not having an insurable interest except in the capacity of trustee for the estate.

#### IV.

The Circuit Court of Appeals erred in holding that the law of Texas was similar to that announced by the decisions cited in its opinion to the effect that only an insurance company can contest a lack of insurable interest, and that where such company tenders the money into the Registry of the Court under a bill of interpleader, no one else can raise the question, because under the law of Texas a person named as beneficiary in a policy can only recover the proceeds if he have an insurable interest. If he have not, he may recover, but he recovers as trustee for the estate of the insured, and the estate of the insured can make itself a party to legal proceedings and assert its rights under the trust theory.

#### V.

The Circuit Court of Appeals erred in holding that the lower court was not bound to apply the rule of conflicts of law of the State of Texas in which it was sitting, and thereby avoid the force and effect of the law of Texas preventing recovery by a person having no insurable interest.

#### VI.

The Circuit Court of Appeals erred in its holding that the application of the law of Texas to McCoach, Trustee, would constitute an unwarranted extra-territorial control of contracts and regulations on business outside of Texas.

## VII.

The Circuit Court of Appeals erred in not holding that the right to designate a beneficiary in an insurance policy was governed by the law of the domicile of the insured, and in holding that it was governed by the law of the place where the policy was delivered.

## VIII.

The Circuit Court of Appeals erred in holding that the assignment of the policy to McCoach, Trustee, from Gordon was governed by the law of New Jersey, when in fact it was governed by the law of Texas.

## IX.

The Circuit Court of Appeals erred in holding that McCoach Trustee was not limited in his capacity as such by the law of Texas, and in consequence, permitting the recovery by him as Trustee for persons who had no insurable interest.

## X.

The Circuit Court of Appeals erred in the following statement of law:

"The conversion of the term policy into a full life policy, the change of beneficiary, and the assignments of interest in the policy, were made in accordance with clauses in the policy specifically providing therefor. These changes were made by the insurer in the discharge of obligations incurred in and outstanding by virtue of the original insurance contract. Such changes do not constitute new contracts, and do not result in changing the law applicable to the policy."

Firstly: In that while the conversion of the term policy into the full life time policy was admittedly pursuant to the terms of the original contract, and was effectuated in the State of New York, and on both grounds was governed by

the law of the State of New York, the assignment and change of beneficiary from Gordon to McCoach, Trustee was pursuant to the contract made in Texas and governed as an independent collateral agreement by the law of Texas.

Secondly: The insurance policy does not obligate the Insurance Company contractually with respect to the change of beneficiary or an assignment, its duties in connection therewith are purely ministerial, and for that reason neither the change of beneficiary nor the assignment is governed by the law which happens to govern the policy.

**Point "A".**

The courts of the United States are without constitutional power to apply to cases brought before them on account of diversity of citizenship of the parties substantive rules of law or equity different from those which would be applied by a State court of concurrent jurisdiction in deciding the same controversy if it were before it.

"There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or 'general', be they commercial law or a part of the law of torts." (*Erie Railway Co. v. Tompkins*, 304 U. S. 64.)

Likewise, this limitation of power of the United States Court applies in those classes of actions formerly classified as equitable.

"The subject is now to be governed, even in the absence of State statute, by decisions of the appropriate State court. The doctrine applies, though the question of construction arises—not in an action at law but in a suit in equity." (*Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202.)

The Circuit Court for the Fifth Circuit had held the contrary in *Cities Service Oil Company v. Dunlop*, 308 U. S.

208, a pure bill in equity. But this Court held that the local rule with reference to the burden of proof had to be applied.

This Court, in *Fidelity Union Trust Company v. Field*, 311 U. S. , 61 Sup. Ct. 176, *West v. American Telephone & Telegraph Co.*, 311 U. S. , 61 Sup. Ct. 179, announces the rule that the United States Court in ascertaining the State law is bound to follow the same method in finding it that the State court would use.

#### Point "B".

The United States Court must apply the law of the State where it sits, even to a transitory cause of action arising in another State, and even if the Circuit Court be correct in its finding that the law of New York or New Jersey governed the rights of the parties, the lower court sitting in Texas had to apply the law of Texas which includes the Texas rules with reference to conflicts of law. In *Sampson v. Channell*, 110 F. (2d) 754, certiorari denied 310 U. S. 650, the Ninth Circuit Court of Appeals recognized that the burden of proof imposed by the Maine law on the plaintiff in a negligence case was substantive within the rule of *Erie v. Tompkins*, *supra*. Nevertheless, they applied the Massachusetts rule, putting the burden on the defendant, because under Massachusetts law it was considered a procedural rule governed by *lex fori*. Judge Magruder stated:

"If the Federal Court in Massachusetts on points of conflicts of law may disregard the law of Massachusetts as formulated by the Supreme Court of the judicial district, and take its own view 'as a matter of general law', then the ghost of the case of *Swift v. Tyson*, *supra*, still walks abroad, somewhat shrunken in size, yet capable of much mischief."

"It is true that the rule applied in the Maine courts would not be the same as the rule applied in the Massachusetts courts. But this is a disparity that existed

prior to *Erie Railroad v. Tompkins, supra*, and cannot be corrected by the doctrine of that case. It is a disparity that exists because Massachusetts may constitutionally maintain a rule of conflict of laws to the effect that the incidence of burden of proof is a matter of 'procedure' to be governed by the law of the forum. *Levy v. Steiger, supra*." Vide 128 A. L. R., page 405; vide *Waggaman v. General Finance Co.*, 116 F. (2d) 254.

The attention of the Court is called to the fact that a suit upon the policy in the nature of a suit at law was brought in the United States District Court by the plaintiff. The proceeding of the insurer was taken under the Act of Congress of January 20, 1936, c. 13, Sec. 1, 49. Stat. 1096 (U. S. C. A. Sec. 41, Subd. 26).

Acting under Rule 22 and Rule 13, of the Rules of Federal Procedure, the Insurance Company filed a proceeding as a cross claim of defense in the pending action at law. Thus, the insurer asserted a defense in a simple contract action pending in the District Court in Texas. The interpleader statute is but a phase of federal jurisdiction based upon diversity of citizenship, and in view of the decision of this Court that there is no general law, it would seem that the United States Court would have to apply the law of the state wherein it sits, having no other at its command.

#### Point "C".

Contests in the courts of Texas between an estate of an insured and the named beneficiary without insurable interest are frequent, and in each instance the fact that the Insurance Company interpleads and is discharged, has no effect upon the substantive rights of the parties under Texas law. In default of the named beneficiary showing an insurable interest, the proceeds in the registry of the court are invariably adjudged to the estate of the insured. ¶ (*Wilke v. Finn*, 39 S. W. (2d) 836) That opinion, besides illus-

trating the Texas doctrine, which is contrary to the view of the cases cited by the Circuit Court, quotes from *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274, as follows:

"It is against the public policy of this state to allow anyone who has no insurable interest to be the owner of a policy of insurance upon the life of a human being. (*Price v. Knights of Honor*, 68 Tex. 361, 4 S. W. 633; *Schonfield v. Turner*, 75 Tex. 329, 12 S. W. 626; 7 L. R. A. 189; *Insurance Co. v. Hazlewood*, 75 Tex. 351, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893.) In some states it is held that an element of wagering likewise enters into such contracts, which has led, as we believe, to inconsistencies in the decisions in some of the courts. Our court has placed the inhibition against such contracts upon the higher and sounder ground that the public, independent of the consent or concurrence of the parties, has an interest that no inducement shall be offered to one man to take the life of another. Making this the test in every phase of such cases, there can be no inconsistency in our decisions, and the public good will be better guarded.

"Applying this salutary rule the conclusion has been reached by our court that such policy cannot be beneficially owned by any one not interested in the life insured, whether the policy be taken out in the first instance by the non-interested party, with or without the consent of the insured, or whether he acquired the policy by assignment from the person whose life is insured, or from another who had an insurable interest."

Further, in circumstances such as are presented by this record, the Texas rule is as follows:

"When an insurance company has issued a policy upon the life of a person, payable to one who has no insurable interest in the life insured, or when a policy has been assigned to one having no such interest, the insurance company must nevertheless pay the full amount of the policy, if otherwise liable, because it has

so contracted; and it is no concern of the insurer who gets the proceeds, except to see that it is paid to the proper parties, under its agreement. It is simply required to perform its contract, and the law will dispose of the money according to the rights of the parties. (Ins. Co. v. Williams, 79 Tex. 637, 15 S. W. 478, and authorities cited.)"

The only decision on the subject in the State of Texas is *Manhattan Life Insurance Company v. Cohen*, 139 S. W. 51, writ of error denied by the Supreme Court, hence authority under Texas law finally dismissed for want of jurisdiction in the United States Supreme Court, 234 U. S. 123. The decision in that case is as follows:

"But the principle established by the weight of authority seems to be that an assignment of a policy of insurance, or the benefit thereunder, is a contract distinct and separate from the original contract of insurance, and is governed by the law of the place where the assignment was made, without reference to the place where the original contract was made, or to the law governing the contract. (2 Wharton, Conf. of Laws, 467g) See the entire section and the authorities cited in notes for the rule stated and its exceptions and limitations. See also, *Johnson v. Mutual Life Ins. Co.*, 180 Mass. 407, 62 N. E. 733, 63 L. R. A. 833, especially note 'h', page 858."

"We take it that the evidence establishes beyond dispute that the assignment of the policies here involved was made in Texas, and that it is governed by the rule stated. Hence the liability of the insurance company on the policies is determinable by the laws of this state and not of Georgia."

"Even if the assignment of the policies had been made in the State of Georgia, and it should be held valid under the laws of that state, it may be doubted whether, on account of its being contrary to the distinctive policy of the forum in which this suit was brought, such laws would be given effect by the courts

of Texas. 1 Whart. on Conflicts of Laws, Sec. 4a. For the same principle upon which the policy of this state is based, i.e., to protect the life of its citizens against the temptation of an assignee of a life policy who has no insurable interest in the life of the insured to shorten its duration, might be held to obtain in its forum, regardless of where the assignment was made. (*Barry v. Equit. Ins. Co.*, 59 N. Y. 587.)"

#### Point "D".

The State of New York declined to recognize the validity of an assignment made in Maryland by a citizen of New York in the courts of New York contrary to the policy of that state, as declared by a statute prohibiting the wife from assigning a policy of insurance on the life of her husband (*Barry v. Equitable Life Insurance of N. Y.*, 59 N. Y. 587), where the real controversy was between the parties to the assignment, though the insurer was a party.

The same result was reached in *Milhous v. Johnson*, 21 N. Y. S. R. 382, 4 N. Y. Supp. 199, where a New York court declined to recognize the validity of an assignment in the State of Ohio, and valid there, because the husband had not ~~consented~~ thereto. In this case, likewise, the insurer had paid the money into court and had been discharged.

It will be noticed that *Barry v. Equitable Life*, *supra*, is cited by the Texas court in *Manhattan Life Insurance Co. v. Cohen*. If New York be not bound to recognize the validity of assignments contrary to her policy made elsewhere, neither is Texas.

#### Point "E".

The power of one of the several states to condemn by legislative action contracts which may be perfectly permissible in all forty-seven others, and to refuse the enforcement of such contracts in its courts, has never been doubted by any decision of the United States Supreme Court. The

definition of "public policy" may be and often is as here laid down by the highest tribunal of the state. Public policy is the same, whether declared by the legislature or the court. It binds the citizens of that state and those dealing with them.

"But elementary as is the rule of comity, it is equally rudimentary that an independent state under that principle will not lend the aid of its courts to enforce a contract founded upon a foreign law, where to do so would be repugnant to good morals, would lead to disturbance and disorganization of local municipal law, or in other words, violate the public policy of the state where the enforcement of the foreign contract is sought. It is moreover, axiomatic that the existence of the described conditions preventing the enforcement in a given case does not depend exclusively upon legislation, but may be the result of judicial construction and consideration of the subject, although it is also true that courts of one sovereignty will not refuse to give effect to the principle of comity by declining to enforce contracts which are valid under the laws of another sovereignty unless constrained to do so by clear conviction of the existence of the conditions justifying that course. And finally, it is certain that as it is peculiarly within the province of the lawmaking power to define public policy of the state, where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under foreign law, comity will yield to the manifestations of the legislature's will and enforcement will not be permitted." (*Bond v. Hume*, 243 U. S. 15, and vide *Union Trust Company v. Grosman*, 245 U. S. 413.)

#### Point "F".

In order to show the erroneous conclusion of the Circuit Court to the effect that the change of beneficiary and assignment were made in accordance with the clauses providing

therefor, and hence did not constitute a new contract and are governed by the law governing the main policy, it is necessary to show certain provisions of these instruments.

The Record, page 5, shows without any ambiguity whatever that a contract was made by letter between Gordan and the Syndicate, and that Gordon accepted a written proposal addressed to him through the mail by posting a reply accepting it, in Texas.

The Record, page 6, likewise shows that after this contract was consummated, the Syndicate wrote the insurer inquiring how to record the same on the policy, and was furnished the forms called "Change of Beneficiary and Extension of Rights" clause. These are found in the Record, pages 15 and 16.

In a letter from the insurer (R. 6) to the Syndicate the former informs the latter that upon receipt of such forms duly executed, the company would endorse the changes. The provision of the policy with reference to the change of beneficiary is quoted (a) in the margin below, and (b) the provision of the policy pertaining to assignments, and (c) the provision of each of the forms.

(a) "If the right to change the beneficiary has been reserved the insured may at any time while this policy is in force, by written notice to the Company at its Home office, change the beneficiary or beneficiaries under this policy, such change to be subject to the rights of any previous assignee, and to become effective only when a provision to that effect is endorsed on or attached to the policy by the Company, whereupon all rights of the former beneficiary or beneficiaries shall cease."

(b) "Any assignment of this policy must be in writing, and the Company shall not be deemed to have knowledge of such assignment unless the original or a duplicate thereof is filed at the Home Office of the Company. The Company will not assume any responsibility for the validity of an assignment."

(c) "It is also agreed that this amendment shall not be operative until the policy shall have been endorsed or re-written in accordance herewith by the Company."

The District Court of the United States in New York, in an opinion by Judge Hand, in *Lovinger v. Garvan*, 270 Fed. 298, treated of a contract between the owner of a policy and a person contracting with such owner to change the beneficiary. He used this language:

"However, if the new beneficiary is a promisee for consideration of the person having the power, he has a right to compel the specific performance of the power, which is not determined by the death of the promisor. If the whole transaction were carried out in detail, he could compel the executors of the promisor to execute the power, which would speak as of the date of the contract. Equity will disregard the formal steps and treat the promisee as an already substituted beneficiary. (*Nally v. Nally*, 74 Ga. 669, 58 A. M. Rep. 458; *Schoenholz v. N. Y. Life Ins. Co.* (App. Div. 1st Dept.), 183 N. Y. Sup. 251. This does not, however, depend upon any vague theory of equity, nor is it based upon general motives of supposed justice. It rests upon the existence of an enforceable contract between the insured and the promisee, creating an obligation to use his reserved power. The case at bar, therefore, turns absolutely upon the existence of such an obligation."

This case was followed with approval by the District Court in *Kansas City Life Insurance Co. v. Jones*, 21 Fed. Sup. 159.

There are no cases save the opinion of the Circuit Court holding that an assignment of a life insurance policy is governed by the law of the state where the policy was issued when it is made in another state (2 Wharton, Conf. of Laws, 467g. Beale on The Conflict of Laws, Sec. 3481, page 1251).

The authorities are in agreement with the text writers and are collated in 63 L. R. A. 833, 23 L. R. A. (N. S.) 968, 52 L. R. A. (N. S.) 275.

It is the universal rule that the endorsement of a change of beneficiary is a purely ministerial act on the part of the insurer, which it cannot decline to perform. These authorities are collated in 78 A. L. R., page 970.

Gordon's interest in the policy and his right to change the beneficiary was recognized by the contract made by letter, (Bigelow on Estoppel, 6th Ed. 495), since the parties assumed such right to exist as a basis of the contract entered upon. His right to receive the disability payments was not in the beneficiary named at that time. The contractual rights—the right to receive the disability payments, and the right giving him the power to appoint—were choses in action having a situs at his domicile. (*Blodgett v. Silberman*, 277 U. S. 1, *Vogel v. New York Life*, 55 Fed. (2d) 205) No lien or special property was asserted by the Syndicate at any time with respect to the policy.

Our position is that the contract made by letter, having been consummated in Texas, and the Insurance Company having nothing more than a ministerial duty to perform, and having consented to endorse when it sent the forms to the Syndicate, which in turn sent them to Gordon, who executed them and deposited them in the mail in Texas addressed to the Syndicate, that the court in determining the locus of the transaction, must necessarily refer it to Texas, since prior to the execution of the forms there existed a valid enforceable agreement which had its<sup>9</sup> existence in Texas, if it had any existence. The ministerial act of the company in endorsing certainly cannot be deemed to change the locus of this agreement from Texas to New Jersey.

No specific cases have been found where the Court of the United States or one of the states has determined the locus

of a power to appoint, where the Insurance Company is domiciled in one state and the insured in another.

However, under a policy of insurance governed by the law of Ohio, Justice Taft when sitting as the Circuit Judge, held in *Knight Templars & Masonic Mutual Aid v. Greene*, 79 Fed. 461, that a designation in the policy of the beneficiary, naming the beneficiary as the "heirs" of the insured, was governed by the law of the State of New York. In the opinion, he said:

"In other words, the language is to be treated as of a testamentary character, and is to receive as nearly as possible the same construction as if used in a will under the same circumstances. The designation was made in New York by one domiciled in New York, for distribution to his family, most of whom lived in New York. If we were considering this language as a clause in a will, whether the money bequeathed was payable in New York or Ohio, there can be no doubt that the word 'heirs' would be construed under the New York law, because that was the domicile of the testator."

The right of a resident of the Province of Manitoba to revoke the designation of his wife as a beneficiary in a policy of insurance on his life and to divert the money elsewhere, is determinable according to the law of Manitoba, notwithstanding that the contract of insurance was made in the Province of Ontario, and was therefore governed by the law of Ontario. The court said that the question was not one of the construction of the policy or contract, but of the capacity of the insured to make a disposition of the benefit of the policy. (*National Trust Co. v. Hughes*, 14 Manitoba L. R. 41.)

The same result was reached with reference to a person domiciled in the Province of Ontario who changed the beneficiary in a policy issued and performable under the laws of the Province of Quebec. (*Toronto General Trusts*

*Co. v. Sewell*, 17 Ontario Reports 442, citing *Lee v. Abdy*, L. R. 17, Q. B. Division 309, 55 L. T. N. S. 297, 34 Week Rep. 653.) In this case the money had been paid into court by the Insurance Company, and the controversy was between the administrator of the insured and the person designated in the endorsement.

If we be correct that McCoach became trustee pursuant to a Texas contract, both he and the *cestuis que trustent* are governed by the law of Texas. The Supreme Court of the State of New York in *First National Bank v. National Broadway Bank*, 156 N. Y. 459, 42 L. R. A. 139, held in dealing with a trust created under the law of New Jersey, that the law of the state where the trust was created governed the trustee and the beneficiary. This being true, the Texas court was bound to construe this contract by the law of Texas, and to impose on the trustee and the beneficiaries thereof the limitation of that law.

The three assignees (R. 8) have already received over \$1600.00 from the disability payments on this policy, and have been paid back through such payments more than they paid for their assignments, and more than they paid in as premiums before the insured became disabled.

The basis of the Circuit Court of Appeals' decision that the collateral contract was governed by the law of the main contract is the case of *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389. That decision does not support the conclusion, because there a term policy issued in Tennessee contained a stipulation that upon the sole option of the insured, he could convert the policy into a twenty-year pay life insurance policy by paying the difference in premiums. He made this election while living in Texas, and the converted policy was delivered to him here. Of course, the converted policy was issued pursuant to the old agreement, and there was no new contract made in Texas, but simply an exercise of a privilege under the old. That is far different from holding that the

law of the original policy governs the transfer of any rights thereunder, wherever they may be transferred.

**Conclusion.**

We submit that this case calls for the exercise by this Court of its supervisory power by granting a Writ of Certiorari and reversing the decision of the Circuit Court of Appeals.

Respectfully submitted,

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